UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. **8:18-CR-361 (NAM)**

GWENIGALE SELWOYAN,

Defendant.

APPEARANCES:

For United States of America:
Grant C. Jaquith
United States Attorney
Edward P. Grogan
Assistant United States Attorney
Office of the United States Attorney
445 Broadway, Room 218
Albany, New York 12207

For Gwenigale Selewoyan:
Lisa A. Peebles, Federal Public Defender
Gabrielle DiBella, Esq.
Assistant Federal Public Defender
Office of the Federal Public Defender
4 Clinton Square, 3rd Floor
Syracuse, New York 13202

Hon. Norman A. Mordue, Senior U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Defendant Gwenigale Selewoyan is charged with one count of making a false statement in violation of 18 U.S.C. § 1001(a)(2). (Dkt. No. 20). On December 20, 2018, Defendant filed a pre-trial motion seeking "to suppress any and all statements made to law enforcement on or about October 16, 2018, because they were obtained in violation of Mr. Selewoyan's Fifth

Amendment right against self-incrimination." (Dkt. No. 10). The Government opposes the motion. (Dkt. No. 14). Defendant has also submitted a reply and additional materials. (Dkt. Nos. 16, 17, 19).

II. BACKGROUND

On October 16, 2018, Defendant was in a car with two other individuals that attempted to cross the Canadian border near Champlain, New York. The other two individuals in the car were Alvin Cole and Augustine Sneh. (Dkt. No. 10-2, p. 2). According to Defendant, he was driving in upstate New York, headed for New Hampshire, got lost, and accidentally came upon the Canadian border. (Dkt. No. 10-3, ¶¶ 2–6). At the border, Defendant says he told an agent from the Canadian Border Services Agency ("CBSA") that he was not seeking to enter Canada and had made a mistake. (Dkt. No. 10-3, ¶ 7).

According to a statement from CBSA Officer Wallace, Defendant, Cole, and Sneh arrived at the St. Bernard de Lacolle Port of Entry to Canada at approximately 6:30 p.m. (Dkt. No. 17, p. 2). They said that they were lost and had no intention of entering Canada. (Dkt. No. 17, p. 2). For identification, Defendant and Cole presented Pennsylvania driver licenses, and Sneh presented a traffic ticket. (Dkt. No. 17, p. 2). CBSA checked their names in the National Crime Information Center database, which "revealed all three ha[ve] NCIC hits as deportable persons." (Dkt. No. 17, p. 2). When asked about their citizenship, "they all responded that they were born in the United States of America," and they claimed to be U.S. citizens. (Dkt. No. 17, p. 2). CBSA Officer Wallace noted that they did not possess the required documents to seek entry to Canada. (Dkt. No. 17, p. 2). According to CBSA Officer Wallace, "[t]he subjects agree[d] to withdraw their application to enter Canada," and they were "returned to the United States of America." (Dkt. No. 17, p. 2).

At 8:45 p.m., CBSA returned Defendant and the two others to the United States at the Champlain, New York Port of Entry. (Dkt. No. 10-2, p. 2; Dkt. No. 10-3, ¶ 8). They were met by officers of United States Customs and Border Protection ("CBP"), including CBP Officer Prell and CBP Officer Rodriguez. (Dkt. No. 14-1, ¶ 3; Dkt. No. 10-2, p. 2). CBSA Officer Wallace informed CBPO Rodriguez that "the three individuals were attempting to go from Plattsburgh, NY to New Hampshire and made a wrong turn." (Dkt. No. 10-2, p. 2). CBSA Officer Wallace also informed CBP that the three individuals did not have proper documents to enter Canada. (Dkt. No. 14-2, ¶ 6). "All three individuals told CBSA that they were United States citizens, however when CBSA ran the individuals in their systems, they came back as citizens of Liberia and having final orders of removal." (Dkt. No. 10-2, p. 2; Dkt. No. 17, p. 2).

The individuals were escorted to a "hard secondary inspection" for further questioning. (Dkt. No. 10-2, p. 2). Defendant states that he "was put in a room with the two other occupants of the vehicle I was driving, along with five or six agents from the United States Border Patrol." (Dkt. No. 10-3, ¶ 9). According to CBPO Prell, this "encounter was part of a secondary inspection conducted on the three individuals per port policy," which "requires any individual(s) which are refused entry to Canada to undergo a secondary inspection to determine their citizenship or legal status in the United States as well as declarable customs issues." (Dkt. No. 14-1, ¶ 3). Defendant presented a Pennsylvania driver license; Cole presented a Pennsylvania ID card; Sneh did not have any identification and presented a traffic ticket as identification. (Dkt. No. 10-2, p. 2). "None of the three subjects were in possession of a passport or any document that could be used to identify their citizenship." (Dkt. No. 14-1, ¶ 4). Without such documentation, "subjects encountered at the border are asked verbally their citizenship/legal status and that information is then collaborated [sic] through the use of system checks up to and

including biometric information." (Dkt. No. 14-1, ¶ 4). "Subjects determined to be U.S. Citizens or aliens with legal status [] in the U.S. are generally admitted as long as there are no pending legal or Customs related issues." (Dkt. No. 14-1, ¶ 4).

All three individuals were asked about their citizenship: Defendant "claimed that he was a permanent resident of the United States and a citizen of Liberia."; both Cole and Sneh stated that they were U.S. citizens born in Philadelphia. (Dkt. No. 10-2, p. 2; Dkt. No. 14-1, ¶ 5). CBPO Brault was also present for the secondary inspection and witnessed the exchange. (Dkt. No. 14-2, ¶ 7). CBPO Prell asked Defendant "to clarify that he was in fact a U.S. legal permanent resident, to which he responded that he was." (Dkt. No. 10-2, p. 2; Dkt. No. 14-1, ¶ 5; Dkt. No. 14-2, ¶ 7). CBPO Prell asked Defendant if he had a green card, and Defendant responded that he did. (Dkt. No. 10-2, p. 2; Dkt. No. 14-1, ¶ 5; Dkt. No. 14-2, ¶ 7). CBPO Prell asked Defendant where his green card was, and Defendant said it was at home; Defendant said he had not been planning on leaving the country. (Dkt. No. 10-2, p. 2; Dkt. No. 14-1, ¶ 5; Dkt. No. 14-2, ¶ 7). CBPO Prell asked a second time for clarification as to their place of birth and citizenship, and all three individuals repeated their previous responses. (Dkt. No. 10-2, p. 2; Dkt. No. 14-1, ¶ 5). Upon being questioned about their travel itinerary, Cole claimed that "they are aspiring rap artists and are going to New Hampshire to attempt to find females who would like to be in their music videos." (Dkt. No. 10-2, p. 2).

Around this time, CBPO Lasalle and CBPO Rodriguez searched the vehicle Defendant had arrived in; they found a Cayuga County Sherriff's Office ("CCSO") Receipt and release for property dated October 9, 2018 and a black bag. (Dkt. No. 10-2, p. 2). The receipt stated that Cole had items seized by the CCSO including "a stack of Money sized paper, Two (2) $100 bills covered in ink, and two (2) $20 bills covered in ink along with two small bottles of liquid," and

the black bag contained "stacks of white paper that are the same size as a U.S. note, duct tape, two bottles of iodine, [a] stack of black paper that resembled United States currency, one United States dollar, and talc powder." (Dkt. No. 10-2, p. 2). CBPO Rodriquez asked Cole about the receipt and the contents of the black bag, and Cole stated that it was a misunderstanding and that they used the materials to make tickets for their shows. (Dkt. No. 10-2, p. 2). At 9:00 p.m., CBPO Rodriguez contacted the CCSO and learned that "the items were consistent with a 'Black Money' scam, in which a group claims th[ey] smuggled money out of a country and that if an individual rubs the black 'Ink' off the currency, then it is usable." (Dkt. No. 10-2, p. 2).

At approximately 9:00 p.m., CBPO Brault took over questioning. (Dkt. No. 14-2, ¶ 8). CBPO Brault started with Defendant, who claimed that his name was David Gwenigale; Defendant was asked his place of birth and his citizenship, and he claimed that he was a permanent resident of the United States. (Dkt. No. 10-2, p. 3; Dkt. No. 14-2, ¶ 8). Defendant was asked if he had a green card and answered yes. (Dkt. No. 10-2, p. 3; Dkt. No. 14-2, ¶ 8).

At this point, Defendant was fingerprinted, and the fingerprint search came back with the name of Gwenigale Selewoyan, with records indicating "that he is an aggravated felon and has a final order of removal by an immigration judge on 01/20/2009." (Dkt. No. 10-2, p. 3; Dkt. No. 14-1, ¶ 5; Dkt. No. 14-2, ¶ 5). The records check showed that he filed an appeal with the BIA which was dismissed on April 15, 2009, and that he failed to report to ICE/ERO as ordered on October 27, 2014. (Dkt. No. 10-2, p. 3). The records check also showed several criminal convictions. (Dkt. No. 10-2, p. 3). When asked about his failure to report, Defendant stated that he was trying to "live the good life and stay out of trouble." (Dkt. No. 10-2, p. 3).

Defendant states that "[w]hile in this room with five or six agents, myself and the two other occupants were questioned together about our legal status in the United States." (Dkt. No.

10-3, ¶ 10). "The entire time we were questioned, the door to the room remained closed." (Dkt. No. 10-3, ¶ 11). During this initial questioning, Defendant was not provided *Miranda* warnings. (Dkt. No. 10-3, ¶ 12; Dkt. No. 14-1, Dkt. No. 14-2, ¶ 7).

According to CBPO Prell, "during the entire span of the inspection," his questioning of Defendant "was done in a conversational tone," and "with a calm demeanor between myself and [Defendant]." (Dkt. No. 14-1, ¶ 6). At no time during the inspection did Defendant tell CBPO Prell that he did not want to be questioned, or that he wanted an attorney. (Dkt. No. 14-1, ¶ 6). CBPO Prell did not tell Defendant that he had to answer the questions, and CBPO Prell did not make any threats to Defendant. (Dkt. No. 14-1, ¶ 6). According to CBPO Prell, throughout the secondary inspection, Defendant "was conscious, spoke clearly, and appeared to understand and properly respond to my questions." (Dkt. No. 14-1, ¶ 7).

Later that night, CBP contacted the United States Attorney's office at 9:55 p.m., which authorized prosecution of Defendant for making false statements in violation 18 U.S.C. § 1001. (Dkt. No. 10-2, p. 5). Homeland Security Investigations ("HSI") agents Edward Quackenbush and Patrick Fay were called in, and they arrived at 10:30 p.m. (Dkt. No. 10-2, p. 5). At this time, Defendant, Selewoyan, and Cole were each questioned separately, beginning with Cole at 11:05 p.m. and then Sneh at 11:28 p.m. (Dkt. No. 10-2, p. 5). At approximately 11:55 p.m., CBPO Brault advised Defendant of his rights, witnessed by the HSI agents. (Dkt. No. 10-2, p. 5; Dkt. No. 14-2, ¶ 10).

Defendant signed a written waiver form before giving a statement. (Dkt. No. 10-2, p. 5; Dkt. No. 14-2, ¶ 10; Dkt. No. 14-5). CBPO Brault avers that he first advised Defendant of his *Miranda* rights, and "Defendant acknowledged verbally that he understood his rights and signed the top of the form I-214." (Dkt. No. 14-2, ¶ 10). CBPO Brault then asked Defendant if he was

willing to talk with us at this time," and Defendant "said that he understood his rights and was willing to talk with us." (Dkt. No. 14-2, ¶ 10). CBPO Brault then read the waiver section of the form to Defendant in English, and Defendant signed the form. (Dkt. No. 14-2, ¶ 10).

CBPO Brault and the HSI agents then asked Defendant questions regarding his immigration history, his recent travel itinerary, and the materials discovered in the vehicle. (Dkt. No. 14-3, ¶¶ 4–5; Dkt. No. 14-4, ¶¶ 4–5). Defendant "claimed that he never claimed to be a green card holder, but rather that he had an Alien Registration Number and resided in the United States permanently." (Dkt. No. 10-2, p. 5). When asked about the currency-sized paper, iodine, and powder, "he claimed no knowledge of the items but thought they may be the 'girls stuff.'" (Dkt. No. 10-2, p. 5). According to the HSI agents, Defendant "was cooperative and had a pleasant demeanor throughout and answered or attempted to answer all of the questions that were posed to him." (Dkt. No. 14-3, ¶ 5; Dkt. No. 14-4, ¶ 5). Questioning "was done in a conversational tone," and at no time did Defendant ask to stop the interview or request a lawyer. (Dkt. No. 14-2, ¶ 11). Neither CBPO Brault nor the HSI agents told Defendant that he had to answer the questions or made any threats to Defendant. (Dkt. No. 14-2, ¶ 11). According to CBPO Brault, Defendant "was conscious, spoke clearly, and appeared to understand and appropriately respond to my questions in English." (Dkt. No. 14-2, ¶ 13). Defendant was not handcuffed or otherwise restrained, and the door was unlocked. (Dkt. No. 14-3, ¶ 4; Dkt. No. 14-4, ¶ 4). The HSI agents wore casual clothing and did not display their firearms. (Dkt. No. 14-3, ¶ 4; Dkt. No. 14-4, ¶ 4). The interview was cordial and lasted less than 30 minutes. (Dkt. No. 14-3, ¶ 6; Dkt. No. 14-4, ¶ 6). The secondary inspection and the subsequent interview were not recorded.

III. DISCUSSION

Defendant argues that his statements to law enforcement were obtained in violation of his Fifth Amendment right against self-incrimination because: "(1) Mr. Selewoyan was not advised of his *Miranda* rights prior to being subjected to custodial interrogation; and (2) Mr. Selewoyan's statements were not made voluntarily." (Dkt. No. 10-1, p. 1). In response, the Government argues that Defendant was not in custody for purposes of *Miranda* and that he voluntarily waived his *Miranda* rights. (Dkt. No. 14, pp. 7–12). The Government intends "to submit the statements attributed to the defendant during the immigration inspection as well as those statements made following the Miranda warning." (*Id.*, p. 2; *see also* Dkt. No. 26).[1]

A. There is No Need for an Evidentiary Hearing

Defendant requests an evidentiary hearing, whereas the Government suggests that one is not necessary. (Dkt. No. 10-1, p. 8; Dkt. No. 14, p. 13). In general, an evidentiary hearing on a motion to suppress is only required "if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact [exist]." *United States v. Watson*, 404 F.3d 163, 167 (2d Cir. 2005) (citation omitted). "Therefore, the Court has discretion to deny a hearing where . . . the defendant's papers fail to create a dispute over a material fact." *United States v. Guzock*, 998 F. Supp. 2d 102, 109 (W.D.N.Y. 2014) (citation omitted). In this case, Defendant has submitted an affidavit, a CBP Memorandum, and CBSA Statement. (Dkt. Nos. 10-2, 10-3, 17). The Government has submitted affidavits from two CBP Officers and two HSI agents and the signed waiver form. (Dkt. Nos. 14-1, 14-2, 14-3, 14-4, 14-5).

[1] Defendant's statements during the inspection are the basis for the Indictment. (Dkt. No. 5; *see also* Dkt. No. 14, p. 6).

On February 1, 2019, the Court directed Defendant to submit additional briefing "identifying any material factual issues in dispute which warrant an evidentiary hearing." (Dkt. No. 18). Defendant submitted a memorandum on February 8, 2019. (Dkt. No. 19). However, after careful review of the record, the Court finds that the *material facts* in this case are not in dispute, as discussed further below. Therefore, no evidentiary hearing is necessary, and the Court will decide Defendant's motion on the parties' submissions. *See also United States v. Harris*, 548 F. App'x 679, 681 (2d Cir. 2013) (finding that district court was not required to conduct an evidentiary hearing where the material facts were undisputed); *United States v. Yarbrough*, 179 F. App'x 769, 770 (2d Cir. 2006) ("Because Yarbrough did not allege any facts that would challenge the validity of the officers' roadblock, the district court did not abuse its discretion in refusing to conduct a suppression hearing."); *United States v. Younis*, 10-CR-813, 2011 WL 1485134, at *3, 2011 U.S. Dist. LEXIS 42281, at *9 (S.D.N.Y. Apr. 19, 2011) (no hearing required where "Defendant's submission is insufficient as a matter of law to establish that the four pre-arrest interviews were custodial in nature such that he should have received a *Miranda* warning").

The Court will address Defendant's statements in sequence, first the non-*Mirandized* statements, followed by those he made after the warnings and waiver.[2]

B. Defendant's Non-*Mirandized* Statements

To protect the Fifth Amendment right against self-incrimination, authorities may not interrogate a suspect who has been taken into custody without first providing the well-known *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436 (1966). "Pursuant to *Miranda*, the police must advise a defendant of his rights only if two preconditions are met: namely, custody

[2] Defendant has also filed a motion in *limine* seeking to preclude the Government from introducing any evidence related to the items found in the vehicle and related statements. (Dkt. No. 13). The Government has not yet responded, and the Court will not address Defendant's motion at this time.

and interrogation." *United States v. Miller*, 382 F. Supp. 2d 350, 370 (N.D.N.Y. 2005) (citing *Thompson v. Keohane*, 516 U.S. 99, 102 (1995)). "Absent either, non-*Mirandized* statements are admissible." *Id.* Since Defendant has alleged custodial interrogation in the absence of *Miranda* warnings, the burden in this case shifts to the Government to prove that "there was no custodial interrogation implicating *Miranda*." *Id.* at 362. For purpose of this decision, the Court will assume that Defendant was subject to interrogation.

As to custody, for *Miranda* purposes it is "a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes v. Fields*, 565 U.S. 499, 508–09 (2012). "In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Howes*, 565 U.S. at 509 (alteration in original) (internal quotation marks and citation omitted); *see also Stansbury v. California*, 511 U.S. 318, 323 (1994) ("the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned").

In this analysis, courts must examine all of the circumstances surrounding the interrogation, including but not limited to: "the interrogation's duration; its location (e.g., at the suspect's home, in public, in a police station, or at the border); whether the suspect volunteered for the interview; whether the officers used restraints; [and] whether weapons were present and especially whether they were drawn; whether officers told the suspect he was free to leave or under suspicion." *United States v. FNU LNU*, 653 F.3d 144, 153 (2d Cir. 2011). "The circumstances also include, and especially so in border situations, the nature of the questions asked." *Id.* "A reasonable person's expectations about how the questioning is likely to unfold

are also relevant." *Id.* In addition, courts must assess "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509; *see also Maryland v. Shatzer*, 559 U.S. 98, 112 (2010) (noting that the "freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody"). Ultimately, "the overarching 'custody' question is whether 'a reasonable [person] in the suspect's position would have understood' herself to be 'subjected to restraints comparable to those associated with a formal arrest.'" *FNU LNU*, 653 F.3d at 153 (quoting, *inter alia*, *Georgison v. Donelli*, 588 F.3d 145, 155 (2d Cir. 2009)).

In this case, Defendant argues that he was in custody because "a reasonable person in Mr. Selewoyan's situation would not have believed he was free to leave." (Dkt. No. 10-1, pp. 5–6). Defendant points to the following facts: he was transported to the U.S. border by CBSA officials and then moved to a "hard secondary inspection" area by three CBP agents; he was placed in a room with the other occupants of the vehicle and numerous law enforcement agents; the door to the room was closed; the vehicle he was operating was seized and searched; and he was not advised of his *Miranda* rights until three hours into the encounter. (*Id.*). Defendant also insists that the questions were not asked to determine admissibility to the United States, but rather "to elicit incriminating responses." (Dkt. Nos. 10-1, p. 6; 16, pp. 4–5; 19).

As an initial matter, the subjective intent or knowledge of the CBP officers who questioned Defendant is irrelevant in this case. *See Stansbury*, 511 U.S. at 323; *see also FNU LNU*, 653 F.3d at 155 ("Our holding in *United States v Silva*, 715 F.2d 43 (2d Cir. 1983) was abrogated by both *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) and *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) to the *limited* extent that the subjective intentions of an officer should not be considered in the

Miranda analysis."). Thus, Defendant's argument that CBP knew at the outset about his unlawful immigration status is beside the point. (*See* Dkt. No. 10-1, pp. 6–7). Defendant suggests that "[t]here are factual questions regarding what information regarding the admissibility of Mr. Selewoyan was shared between CBSA and CBP." (Dkt. No. 16, pp. 3–4). Despite the Court's pointed reference to *Stansbury and FNU LNU*, (Dkt. No. 18), Defendant continues to argue that the "key issue is the purpose of the questioning." (Dkt. No. 19, pp. 2–3). However, any factual dispute on this issue is immaterial to the custody analysis for *Miranda*, which is focused on the *objective* circumstances of the interview, as perceptible to the person being asked questions. In other words, the state of mind of the CBP officers is only relevant in so far as it was *actually communicated* to Defendant. *See Stansbury*, 511 U.S. at 325 ("An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned.").

Before analyzing Defendant's situation, it is instructive to examine the Second Circuit's decision in *United States v. FNU LNU*, 653 F.3d 144, 155 (2d Cir. 2011), a similar border case. There, the defendant arrived at JFK Airport in New York on a flight from the Dominican Republic, traveling under the name Sandra Calzada. *Id.* at 146. In preparing to process the passengers from the flight, CBP ran the flight's manifest through a database of outstanding warrants and received notice that Calzada's name appeared on a NYPD arrest warrant; CBP flagged the defendant for "secondary inspection." *Id.* Upon arrival, an armed guard escorted the defendant to a secondary inspection room, which she was not free to leave. *Id.* After the defendant presented a U.S. passport in the name of Sandra Calzada, CBP asked her name, citizenship, and where and when she was born. *Id.* CBP took her fingerprints, asked more questions about her name and background, and took a sworn statement. *Id.* The questioning

lasted about 90 minutes. *Id.* Sometime later, it was determined that the defendant had assumed the identity of the real Sandra Calzada. *Id.* at 147. The defendant was charged with making a false statement in a passport application, misusing a passport, and aggravated identity theft. *Id.*

In the district court, the defendant moved to suppress her statements to CBP, on the basis that she had not been provided *Miranda* warnings, and the court denied the motion. *Id.* at 147. On appeal, the Second Circuit found that the defendant was not in custody for purposes of *Miranda*. The Circuit first noted some facts about the interrogation that militated in favor of finding it custodial: "it took place in a closed room, out of public view; armed guards escorted the defendant there and remained in the vicinity; it lasted for 90 minutes; . . . [CBP] took the defendant's fingerprints and did not inform her she was free to go[,]" and she was not free to go. *Id.* at 154–55. But other factors weighed against finding custody: "the officers never drew their weapons; no physical restraints were used; and, crucially, a reasonable person would recognize all [CBP's] questions as relevant to her admissibility to the United States. Such a person would consider them par for the course of entering the country from abroad." *Id.* at 155. Considering the totality of the circumstances, the Circuit concluded that the defendant was not in custody (requiring *Miranda* warnings) because "a reasonable person in the defendant's position would not have considered what occurred to be the equivalent of a formal arrest." *Id.*

1. Defendant Was Not in Custody During the Secondary Inspection

Likewise, in this case, Defendant was first questioned by CBP officers without *Miranda* warnings in a secondary inspection area after entering the United States. The record shows that questioning commenced at approximately 8:45 p.m. in the secondary inspection area, which consisted of a room with a closed door. Although CBSA authorities had denied Defendant and the two others entry into Canada and returned them to CBP, there is no evidence whatsoever that

CBSA or CBP *communicated to Defendant* at this time that they were aware of his unlawful immigration status. Moreover, it was CBP policy for any individuals refused entry to Canada to undergo a secondary inspection upon returning to the United States. (Dkt. No. 14-1, ¶ 3). Notably, Defendant was not separated from his companions during the secondary inspection, but rather they were questioned together. They were asked routine questions about birthplace and citizenship. There is no allegation or evidence that Defendant was restrained, or that the CBP officials drew their weapons. Up to this point, the facts, circumstances, and questions asked Defendant overall demonstrate a routine border inspection, not a custodial interrogation. Therefore, Defendant's initial statement that he is a legal permanent resident of the United States (Statement One), is not subject to suppression.

Shortly thereafter, once CBP had searched the vehicle, CBPO Rodriguez asked Cole about a black bag they found which contained suspicious items (i.e. stacks of white paper the size of U.S. currency) that could be related to counterfeiting or other criminal activity. (Dkt. No. 10-2, p. 3). Cole answered that it was a misunderstanding. (Dkt. No. 10-2, p. 2). Defendant was still in the room at the time. The search of the vehicle does not dictate custody since it is routine for law enforcement to search the personal belongings and effects of persons crossing the border. *See United States v. Silvia*, 715 F.2d 43, 48 (2d Cir. 1983) ("Figueroa was duty-bound to determine whether Silva was entitled to enter the country with her effects."); *see also United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004) (recognizing that routine border searches of persons and their effects, including vehicles, do not require reasonable suspicion, probable cause, or a warrant). Arguably, the question posed to Cole could have changed the tone of the interview from inspection to investigation. But it is also routine for border officials to ask persons about the nature of their possessions to determine if they may be

legally brought into the United States. This is not a case where CBP found obvious criminal contraband such as narcotics and then asked about it. Given the ambiguous nature of the recovered items, and the fact that the related question was only posed to Cole, the Court finds that the totality of circumstances still show a routine border inspection.

At approximately 9:00 p.m., CBPO Brault asked Defendant for his place of birth and citizenship, and Defendant again claimed that he was a permanent resident of the United States. (Dkt. No. 10-2, p. 3; Dkt. No. 14-2, ¶ 8). Defendant was asked if he had a green card and answered yes. (Dkt. No. 10-2, p. 3; Dkt. No. 14-2, ¶ 8). The Court will refer to these answers as Statement Two. CBP then went about fingerprinting Defendant and the two others and looking for matches in the FBI's databases. (Dkt. No. 10-2. P. 3; Dkt. No. 14-2, ¶ 9). It was determined that Defendant was "an aggravated felon with a final order of removal against him by an immigration judge," and that he "failed to report to ICE/ERO as ordered on 10/27/2014." (Dkt. No. 10-2, p. 3). When asked about his failure to report, Defendant stated that he was trying to "live the good life and stay out of trouble." (Dkt. No. 10-2, p. 3). The Court will refer to this answer as Statement Three.

Questioning ceased, and the first phase of questioning concluded. The Government indicates that the secondary inspection finished at approximately 9:15 p.m. (Dkt. No. 14, p. 6). It is not clear how the Government arrived at this specific time, but the record shows that, at 9:55 p.m., CBP contacted the United States Attorney's office, which authorized prosecution of Defendant for making false statements in violation 18 U.S.C. § 1001. (Dkt. No. 10-2, p. 5). Therefore, it appears that the secondary inspection lasted between 30 to 70 minutes.

After careful review of the facts and circumstances, the Court finds that Defendant was not in custody during the secondary inspection, until the very end when he was confronted about

his unlawful immigration status. Several facts militate in favor of finding Defendant in custody: he had been denied entry to Canada; he did not volunteer for questioning, it took place in a closed room out of public view, Defendant's companion was asked about suspicious items, it lasted longer than a brief, in-car border stop, Defendant was not told that he was free to go, and he was not free to go. The questioning also involved multiple CBP Officers—as many as "five or six," taking as true Defendant's version of events. (Dkt. No. 10-3, ¶ 10).[3]

On the other hand, Defendant was questioned at the same time as his two companions, Defendant was not restrained, there is no evidence that the officers drew their weapons, and the questions were routine, basic queries associated with crossing the border. Defendant was not directly asked about the suspicious items in the vehicle. Defendant's affidavit simply states that "myself and the two other occupants were questioned together about our legal status in the United States." (Dkt. No. 10-3, ¶ 10). There is no allegation that the questions or conduct of law enforcement somehow coerced or compelled his statements. The questioning was calm and conversational and did not involve any threats. Crucially, a reasonable person would recognize the questions asked by CBP as relevant to admissibility to the United States.

Although Defendant was not told that he was free to leave, and he was not free to do so, the "freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010). Furthermore, Defendant was not told that he had to answer the questions or that he was under suspicion. Defendant contends that a person "who is the subject of a removal order would certainly feel a degree of restraint normally associated with an arrest." (Dkt. No. 19, p. 4). But even if the CBP officers knew at the outset about Defendant's unlawful immigration status, there is no evidence that they

[3] The record indicates that only three CBP officers (Prell, Rodriguez, and Brault) participated in the secondary inspection, while two HSI agents joined Brault for the later questioning. (Dkt. No. 10-2; Dkt. No. 14-1; Dkt. No. 14-2, Dkt. No. 14-3; Dkt. No. 14-4).

communicated that fact to him, as discussed above. The mere fact that someone being questioned by law enforcement knows that he has broken the law does not automatically create a custodial interrogation.[4] *See Stansbury*, 511 U.S. at 323.

Finally, the questioning lasted at most 70 minutes (spread across three individuals), and Defendant never asked to stop and never requested a lawyer. Accordingly, based on the totality of the circumstances, the Court finds that Defendant was not in custody because "a reasonable person in the defendant's position would not have considered what occurred to be the equivalent of a formal arrest." *See FNU LNU*, 653 F.3d at 155. Therefore, Statements One and Two made by Defendant are not subject to suppression. *See also United States v. Yilmaz*, 508 F. App'x 49, 52 (2d Cir. 2013) (finding that the defendant was not in custody during 90 minutes of questioning during "secondary inspection" at the border, where questions were "routine and relevant to his admissibility and the admissibility of his effects"); *United States v. Ibrahim*, 998 F. Supp. 2d 12, 16 (N.D.N.Y. 2014) (finding that the defendant was not in custody during two hour interview at the border where the questioning was "entirely consistent with a routine secondary inspection seeking to confirm [the defendant's] identity").

2. Statement Three is Subject to Suppression

Based on the undisputed facts, the interrogation shifted into a custodial one when Defendant was confronted with evidence of his unlawful immigration status, which also demonstrated the falsity of his earlier statement that he was a lawful permanent resident of the United States. Therefore, to the extent the Government seeks to introduce Statement Three, it is not admissible as evidence. *See also United States v. Tajah*, 13-CR-55V, 2016 WL 3661777, at *7, 2016 U.S. Dist. LEXIS 89776, at *27 (W.D.N.Y. July 11, 2016) ("The results of Tajah's

[4] Moreover, Defendant's affidavit does not even state that he knew he was subject to a removal order. (Dkt. No. 10-3).

fingerprint check, and Jann's presentation of the results to Tajah, marked a sharp change from border processing to criminal interrogation.").

3. Defendant's Non-*Mirandized* Statements Were Voluntary

Defendant further argues that his non-*Mirandized* statements were made involuntarily. (Dkt. No. 10-1, pp. 7–8). Defendant contends that his statements were "the product of government compulsion" because: "[h]e was not advised of his constitutional rights,"; and "[h]e was questioned repeatedly in custody and in the presence of several law enforcement officials." (*Id.*). This argument is unavailing for many of the same reasons discussed above. In general, a statement is only involuntary if it is "obtained under circumstances that overbear the defendant's will at the time it is given." *United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991). The inquiry into voluntariness should contemplate "the totality of all the surrounding circumstances." *United States v. Taylor*, 745 F.3d 15, 23–24 (2d Cir. 2014). Factors for the Court to consider in the totality of the circumstances inquiry include: (1) "the characteristics of the accused"; (2) "the conditions of interrogation"; and (3) "the conduct of law enforcement officials." *United States v. Awan*, 384 F. App'x 9, 14 (2d Cir. 2010).

Here, all three factors show that Defendant's statements were made voluntarily. Defendant is an adult and conversant in English. (Dkt. No. 14-1, ¶ 5; Dkt. No. 14-2, ¶ 8). There is no evidence that he lacks intelligence or the capacity to understand basic questions. Defendant has lived for many years in the United States, and he has previous experience with law enforcement, including several arrests and convictions. (Dkt. No. 10-2, p. 3). The conditions of interrogation also support voluntariness, as discussed above for the custody issue. In addition, the conduct of law enforcement was not overbearing or coercive, and there is no evidence that any threats or promises were made to elicit Defendant's statements. While

Defendant was not told that he could leave, he was not told that he had to answer the questions. (Dkt. No. 14-1, ¶ 6; Dkt. No. 14-2, ¶ 11).

Accordingly, based on the totality of the circumstances, Defendant's statements were made voluntarily. *See United States v. Haak*, 884 F.3d 400, 414–16 (2d Cir. 2018) (statements voluntary where the totality of circumstances did not demonstrate that the defendant's will was overborne by police conduct); *see also United States v. Wilson*, 100 F. Supp. 3d 268, 284 (E.D.N.Y. 2015) ("The weight of the evidence indicates that Defendants' pre-*Miranda* warning statements were voluntary. Under the circumstances, they are not subject to suppression."); *United States v. Tudoran*, 476 F. Supp. 2d 205, 216 (N.D.N.Y. 2007) ("Factually, there is nothing that occurred during the entire encounter suggesting that Tudoran was coerced to speak as a result of police conduct, the conditions of the interrogation, or the characteristics of Tudoran himself. Accordingly, none of the statements are involuntary, and the motion to suppress the statements on that basis is denied.").

C. Defendant's *Mirandized* Statements

The second phase of questioning began at approximately 11:55 p.m., after CBP and HSI gave Defendant *Miranda* warnings and he signed a waiver. Defendant said that he never claimed to be a green card holder, but rather that he had an Alien Registration Number and resided in the United States permanently, and that he had no knowledge of the suspicious items found in the car, which may be the "girls stuff." (Dkt. No. 10-2, p. 5). The Court will refer to theses answers as Statement Four.

Defendant seeks to suppress Statement Four, apparently on the basis that the waiver was not knowing, intelligent, and voluntary. (Dkt. No. 16, p. 8). Therefore, "the government must prove by a preponderance of the evidence that he was properly *Mirandized,* and knowingly,

intelligently and voluntarily waived his rights." *Ibrahim*, 998 F. Supp. 2d at 17. In other words, "the government must prove that [Defendant] understood his *Miranda* rights, understood the consequences of waiving those rights, and, under the totality of the circumstances, made an uncoerced choice to do so with the requisite level of comprehension as to what he was doing." *Id.*

Here, the record shows that Defendant signed a written waiver form ("I-214") at approximately 11:55 p.m. on October 16, 2018.[5] (Dkt. No. 14-5, p. 1). CBPO Brault avers that he first advised Defendant of his *Miranda* rights "via service form I-214," and that "Defendant acknowledged verbally that he understood his rights and signed the top of the form I-214." (Dkt. No. 14-2, ¶ 10). Defendant's signature appears in the space in the form under "I have read (or have had read to me) this statement of my rights and I understand what my rights are." (Dkt. No. 14-5, p. 1). The advisement was provided by CBPO Brault and witnessed by the HSI agents. (Dkt. No. 14-2, ¶ 10). According to CBPO Brault, he asked Defendant if he was willing to talk with us at this time," and Defendant "said that he understood his rights and was willing to talk with us." (Dkt. No. 14-2, ¶ 10). CBPO Brault then read the waiver part of the form to Defendant in English, and Defendant signed the form. (Dkt. No. 14-2, ¶ 10). Defendant's signature appears in the space in the form under "I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind is being used

[5] Defendant argues that the Government failed to produce the waiver form in a timely manner during discovery, in violation of the Criminal Pretrial Scheduling Order and Rule 16 of the Federal Rules of Criminal Procedure. (Dkt. No. 16, p. 8). Defendant asks that the Government be precluded from introducing the waiver into evidence. (*Id.*). However, even assuming the form was produced late, Defendant has not pointed to any prejudice sufficient to warrant exclusion. *See United States v. Lee*, 549 F.3d 84, 98 (2d Cir. 2008).

against me." (Dkt. No. 14-5, p. 1). The HSI agents have submitted affidavits consistent with this sequence of events. (Dkt. No. 14-3, ¶ 5; Dkt. No. 14-4, ¶ 5).

Defendant argues that "[t]here are insufficient facts surrounding the waiver of rights," speculating that "[w]e will never know if any promises were made or if there was otherwise any deception on behalf of the officers that would have induced the defendant into waiving his rights." (Dkt. No. 16, p. 8). Defendant also suggests that "[t]here are chunks of time in which the Government does not account for what happened to [him]." (Dkt. No. 19, p. 5). However, Defendant is obviously in a position to offer his version of the facts, and he does not allege that any threats or promises were made, nor that any deception or other acts induced his waiver. Indeed, Defendant's affidavit does not mention anything at all about his waiver of rights. (*See* Dkt. No. 10-3).

Accordingly, based on the undisputed facts, the Court finds that the Government has proven by a preponderance of the evidence that Defendant was properly *Mirandized* and his waiver was knowing, intelligent, and voluntary. Therefore, Statement Four is not subject to suppression. *See Ibrahim*, 998 F. Supp. 2d at 18 (finding that the defendant understood his *Miranda* rights and validly waived them where, among other things, "he had previously resided in the United States as an unlawful alien; his *Miranda* warnings were individually read to him and he initialed them, signaling his understanding; and his *Miranda* waiver was read to him and he signed it, again signaling his understanding"); *United States v. Artis*, 10-CR-15-01, 2010 WL 3767723, at *8, 2010 U.S. Dist. LEXIS 97279, at *23 (D. Vt. Sept. 16, 2010) (finding that the defendant's waiver was valid where, among other things, there was "no evidence that his waiver was the product of deceit, trickery, threats, coercion, or intimidation," and "no evidence that law enforcement made any promises . . . to secure the waiver").

IV. CONCLUSION

For these reasons, it is

ORDERED that Defendant's motion to suppress (Dkt. No. 10) is **GRANTED in part and DENIED in part**; and it is further

ORDERED that Defendant's Statement Three, as specified above, shall not be admissible as evidence; and it is further

ORDERED that Defendant's motion is **otherwise DENIED**; and it is further

ORDERED that the Clerk of the Court provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

Date: March 21, 2019
Syracuse, New York

Norman A. Mordue
Senior U.S. District Judge